STATE OF MICHIGAN

COURT OF APPEALS

HELENA LUSBY,

Plaintiff/Counter-Defendant-Appellee,

v

RANDALL J. TELMAN, SCOTT R. BRUNDAGE, DOUGLAS M. LEPPINK, CAROL J. FEWLESS, and CENTRE FOR PLASTIC SURGERY,

Defendants/Counter-Plaintiffs-Appellants.

UNPUBLISHED
April 1, 2003

No. 237210
Kent Circuit Court
LC No. 00-004775-NZ

Before: Griffin, P.J., and Neff and Gage, JJ.

NEFF, J. *(dissenting).*

I respectfully dissent. Because I find no abuse of discretion on the part of the trial judge, I would affirm.

As noted in the majority opinion, the trial court denied defendants' motion for costs and fees, concluding that defendants' early, low offer constituted a form of gamesmanship. I agree with this assessment and believe that the record supports it.

The trial court may, in the interest of justice, refuse to award an attorney fee, MCR 2.405(D)(3), including where an insincere offer has been made for the purpose of gamesmanship. *Luidens v 63rd Dist Court*, 219 Mich App 24, 33-37; 555 NW2d 709 (1996).[1] As noted, we review a trial court's decision to award or deny sanctions under MCR 2.405 for an abuse of discretion. *J C Bldg Corp II v Parkhurst Homes, Inc*, 217 Mich App 421, 426; 552 NW2d 466 (1996).

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[1] As pointed out by the trial judge in his ruling on the motion for fees and costs, *Luidens* is not strictly on point here because *Luidens* involved an offer of judgment made after a mediation evaluation. However, the court went on to note that the case law supports the view that "a . . . reflexive offer of judgment at a very low amount right out of the box at the pleading stage is viewed with some suspicion. . . . [T]he general policy articulated is that we frown on obviously low ball . . . offers early in the case which is pretty much what we have here."

In denying defendants' motion for fees and costs, the trial court concluded that defendants had engaged in gamesmanship. The record supports this conclusion. The offer of judgment in the amount of $500 was certainly de minimus as noted by the trial judge. In addition, the counterclaim filed by defendants was of questionable merit on its face, and when the parties argued their motions for summary disposition, defense counsel offered to dismiss the counterclaim if the trial court granted the defense motion for summary disposition. In ruling on the motions, the trial court declined the offer, ruling that "it's not a claim which is, in any case, viable by these defendants as against this plaintiff, ..." The court accordingly granted summary disposition to plaintiff on the counterclaim,[2] a ruling which defendants have not challenged on appeal. The combination of the de minimus offer of judgment and the meritless counterclaim lead me to conclude that the trial court's ruling that defendants engaged in gamesmanship is supported by the record and is sufficiently "unusual" to meet the "interest of justice" exception to the general rule of MCR 2.405. Accordingly, I hold that the decision to deny the motion for fees and costs was not an abuse of discretion.

I would affirm.

/s/ Janet T. Neff

[2] The trial court, an experienced circuit judge, noted in his ruling that he could not recall a recent or, indeed, even an old case, in which he did not grant an award of fees as called for by MCR 2.405, indicating that he had no reservations or doubts about his ruling in this case to deny the motion for costs and fees.